

In the Matter of William Malayter

Docket No. 2006-2201

(Merit System Board, decided March 22, 2006)

The Superior Court, Law Division, has transmitted, by the attached order, the case of *Malayter v. Township of Jackson* to the Merit System Board pursuant to *Melani v. County of Passaic*, 345 N.J. Super. 579 (App. Div. 2001), for a determination regarding William Malayter's entitlement to permanent status in the title of Plumbing Subcode Official and, in turn, his entitlement to a hearing regarding his removal, effective December 7, 2004.¹

By way of background, Department of Personnel (DOP) records reflect that the appellant received a temporary appointment to the title of Plumbing Subcode Official with the Township of Jackson, effective May 6, 1991. The appellant received a Preliminary Notice of Disciplinary Action (PNDA) dated August 22, 2002, charging him with conduct unbecoming a public employee, neglect of duty, and other sufficient cause. Following a departmental hearing on November 26, 2002, he received a 30-day suspension via Final Notice of Disciplinary Action (FNDA) dated December 10, 2002. In addition, on July 6, 2004, the appellant was served with a PNDA, charging him with incompetency, inefficiency, or failure to perform duties, and insubordination. Following a departmental hearing, the appellant received a FNDA imposing a 45-day suspension. He filed a timely appeal with the Board regarding his 45-day suspension. On September 15, 2004, he was served with a PNDA, immediately suspending him from employment and seeking his removal on charges of conduct unbecoming a public employee, incompetency, inefficiency, or failure to perform duties, and other sufficient cause (harassment). Following a departmental hearing, the appellant was served a FNDA on January 14, 2005, sustaining the charges of conduct unbecoming a public employee and incompetency, inefficiency, or failure to perform duties and removing him from employment, effective December 7, 2004. By letter dated January 22, 2005, staff of the Division of Merit System Practices and Labor Relations (MSPLR) advised the appellant that he had not attained permanent status in any title, and, as such, the Board lacked jurisdiction to entertain the appeal of his 45-day suspension, pursuant to *N.J.S.A. 11A:2-6* and *N.J.A.C. 4A:2-2.1*. Thereafter, the appellant filed a complaint in the Superior Court, Law Division, challenging his termination on several grounds. On November 29, 2005, the Honorable Eugene D. Serpentelli, A.J.S.C., ordered that this matter be transferred to the Department of Personnel in accordance with *Melani v. County of Passaic*, 345 N.J. Super. 579 (App. Div. 2001).

¹ Although Department of Personnel records indicate an effective date of January 4, 2005 for the appellant's removal, the Final Notice of Disciplinary Action removing him from employment contains an effective date of December 7, 2004.

In the instant matter, the appellant, represented by Steven I. Pfeffer, Esq., submits documentation to demonstrate his reasonable belief that he was permanent in the title of Plumbing Subcode Official and to demonstrate his qualifications for that title. Specifically, he submits Jackson Township Resolution Number 226R93C, which effectuated his “full-time provisional” appointment to the title of Plumbing Subcode Official, effective May 10, 1993.² The appellant also submits various documents related to his enrollment in the Public Employees Retirement System and the Township’s medical benefits program. In addition, the appellant submits a copy of his license as a Plumbing Inspector – High Rise and Hazardous (HHS), a Subcode Official – Plumbing, and a Construction Official, issued by the Department of Community Affairs. The documents submitted demonstrate that he first attained these licenses on September 6, 1989, and his current licenses expire on January 31, 2007.

Although the Township has not presented its position in the instant matter, the appellant submits a letter dated October 26, 2005, in which the Township, represented by Michael J. Gilmore, Esq., supplies him with documents from his personnel file “which would appear to suggest civil service status, or notice to the DOP that [the appellant] was being treated by the Township as though he had civil service status.”

It is noted that the DOP job specification for the title of Plumbing Subcode Official provides that:

Applicants must possess a valid license as a Plumbing Subcode Official issued by the New Jersey Department of Community Affairs.

Applicants must also possess a valid license as a Plumbing Inspector at the appropriate level, industrial and commercial (ICS), or high rise and hazardous (HHS), depending on the class of structure, issued by the New Jersey Department of Community Affairs.

CONCLUSION

In *Kyer v. City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), the court determined that the City of East Orange’s (“City”) actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy.

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations.

² DOP records contain no documentation evidencing the appellant’s provisional appointment.

Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee *who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence*, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiff's to be. [*Kyer, supra*, 315 N.J. Super. at 532-533 (emphasis added)].

Accordingly, the court transferred the case to the DOP to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, after the remand, the Board determined that, notwithstanding Kyer's years of service or the misdeeds of the appointing authority, she was not entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999).

Similarly, in *Melani v. County of Passaic*, 345 N.J. Super. 579 (App. Div. 2001), the Superior Court, Appellate Division, transferred the matter of a long-term provisional employee who was laid off effective May 1, 1998 to the Board for the fashioning of a remedy. Again, however, the Board ultimately determined that the appellant in *Melani* was not entitled to a remedy. Specifically, the Board determined that, at the time of her provisional appointment, she did not meet the open-competitive requirements for her title, and, as such, she could not have achieved permanency even absent municipal negligence. *See In the Matter of Dina Melani* (MSB, decided May 15, 2002). *Cf. In the Matter of Glenn Crane, City of Newark*, Docket No. A-0413-04T3 (App. Div. February 17, 2006) (Appellate Division upheld Board's decision to grant permanent status to a long-term provisional employee, who was informed by the appointing authority that he was being permanently appointed from an eligible list on which his name appeared).

In the instant matter, the appellant submits documentation demonstrating that he was provisionally appointed "pending Department of Personnel Certification" effective May 10, 1993, via a resolution of the Township Committee. According to DOP records, the appellant's provisional appointment was never reported to the DOP. Had his provisional appointment been reported and recorded by the DOP, the open-competitive examination process would have commenced. The examination process would have enabled the DOP to review his qualifications, and if applicable, administer an examination testing his knowledge, skills, and abilities, relative to other qualified candidates. Certainly, both the Township and the appellant were aware of the provisional nature of the appellant's appointment,

since it is expressly stated in the Township Committee's resolution, and of the necessity of examination procedures prior to the attainment of permanent status. On the current record, it does not appear that the Township or the appellant ever followed up with the DOP to inquire into the status of the announcement and administration of the requisite open-competitive examination. In this respect, the instant scenario is somewhat distinguishable from the cases discussed above, in that the appellant was aware of the provisional nature of his appointment and the necessity of taking further steps to achieve permanency at the time his appointment was effectuated. He was not misled in any way at the time of his appointment regarding the nature of that appointment.

Nevertheless, it is evident that, since the time of his initial provisional appointment, the appellant was led to believe that he enjoyed status as a permanent employee and the rights and emoluments commensurate with permanent status. In this regard, on the three occasions in which the appellant has been subjected to major disciplinary action, he has been afforded notice and an opportunity for a departmental hearing, as well as appeal rights to the Board. Moreover, the record reflects that both the appellant and the Township were unaware of the appellant's failure to attain permanency in his title. In the Township's October 26, 2005 letter, it supplies the appellant with documents "which would appear to suggest civil service status, or notice to the DOP that [the appellant] was being treated by the Township as though he had civil service status."

Therefore, it appropriate to undertake a review of the appellant's qualifications at the time of his provisional appointment, in accordance with *Kyer* and *Melani, supra*, in an effort to discern whether he could have achieved permanency in his title at that time. Here, applicants for the title of Plumbing Subcode Official are required to possess a valid license as a Plumbing Subcode Official and a valid license as a Plumbing Inspector at the appropriate level, industrial and commercial (ICS), or high rise and hazardous (HHS), depending on the class of structure, issued by the New Jersey Department of Community Affairs. Here, the appellant has submitted documentation demonstrating his possession of the required licenses at the time of his provisional appointment. Accordingly, the Board finds that the appellant has demonstrated his entitlement to permanent status in his title, and his personnel records should be changed to reflect his permanent appointment to the title of Plumbing Subcode Official on May 10, 1993.

As such, the appellant's timely appeal of his 45-day suspension, commencing on July 12, 2004, should be transmitted to the Office of Administrative Law (OAL) for a hearing as contested case. Further, although the appellant did not file a timely appeal with the Board regarding his December 7, 2004 removal, the Board notes that he was advised by staff of MSPLR approximately one week after receipt of the FNDA removing him that he lacked permanent status and the right to appeal to the Board. In addition, the Board takes note that the appellant filed a complaint

in the Superior Court, Law Division, challenging his termination, on February 7, 2005. Accordingly, the Board finds that it is appropriate to also grant the appellant a hearing at the OAL regarding his removal.

ORDER AS TO EMPLOYMENT STATUS

Therefore, it is ordered that the appellant's request for permanent status as a Plumbing Subcode Official, effective May 10, 1993, be granted.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

ORDER AS TO 45-DAY SUSPENSION AND REMOVAL

It is ordered that the matters of the appellant's 45-day suspension and removal be transmitted to the Office of Administrative Law for hearings as contested cases.